Office - Supreme Court, U. S.
FILED
FEB 17 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 746

EDWARD D. MARKHAM,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. EARLE G. H. CROMER, THE VILLAGE OF MAYWOOD, A MUNICIPAL CORPORATION, EARLE K. BROBERY, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, THOMAS E. BARRETT, HARRY M. GERHARD, VERNON V. SMITH, MILTON SEBASTIAN, FRANK H. GAY, AND RICHARD W. BAUR, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, CLARENCE A. TEVANDER, INDIVIDUALLY AND AS CLERK OF THE VILLAGE OF MAYWOOD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

CHARLES J. MONAHAN,
77 West Washington Street,
Chicago, Illinois,
HENRY I. GREEN,
Urbana, Illinois,
Attorneys for Petitioner.

THE DUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Petition for Writ of Certiorari	1
I. Summary and Short Statement of the Matter Involved	1
II. Basis Upon Which Petitioner Contends This Court Has Jurisdiction	4
III. Question Presented	4
IV. Reasons Relied On for Allowance of the Writ	5
Brief in Support of Petition for Writ of Certiorari	9
I. Opinion of the Court Below	9
II. Jurisdiction of This Court	9
III. Statement of the Case	9
IV. Specification of Errors	10
V. Argument	11

Cases Cited.

Carpenter v. Shepherd (Texas), 145 S. W. (2d) 562... 18

McCoy v. Board of Supervisors of Los Angeles County (California), 114 Pac. Rep. (2d) 569..... 18

State v. Grayston (Missouri), 163 S. W. (2d) 335..... 18

State of Louisiana v. Joseph (Louisiana), 78 So. 663.. 18

Statutes.

Article I, Section 8, Federal Constitution..... 12

Article II, Section 2, Federal Constitution..... 13

Article IV, Section 4, Federal Constitution..... 13

Article VI, Par. 2, Constitution of the United States.. 12

Chapter 1, Section 2, Title 10 U. S. C. A.—Army—as amended December 13, 1941, pocket supplement U. S. C. A., page 3..... 17

Decisions in Direct Conflict With the Decision of the Illinois Supreme Court in This Case..... 18

In re Advisory Opinion to the Governor, Supreme Court of Florida, en Banc, 8 So. Rep. (2d) 26..... 18

Later Advisory Opinion to the Governor by the Supreme Court of Florida, 9 So. Rep. (2d) 172..... 18

Section 235, Judicial Code, Section 343, Title 28 U. S. C. A., par. b..... 4

"The Selective Training and Service Act of 1940" U. S. C. A. Title 50—War, Cumulative Annual Pocket Part 1941, page 88, Section 308..... 14

"Service Mens Employment Tenure Act" (Ill. Rev. Stat. State Bar Ass'n. Ed. 1941, Page 3022, Secs. 29 to 35 of Chap. 126½) entitled "Soldiers and Sailors"; 1941 Sessions Laws. Vol. 1, page 1202..... 15

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

EDWARD D. MARKHAM,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. EARLE G. H. CROMER, THE VILLAGE OF MAYWOOD, A MUNICIPAL CORPORATION, EARLE K. BROBERY, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, THOMAS E. BARRETT, HARRY M. GERHARD, VERNON V. SMITH, MILTON SEBASTIAN, FRANK H. GAY, AND RICHARD W. BAUR, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, CLARENCE A. TEVANDER, INDIVIDUALLY AND AS CLERK OF THE VILLAGE OF MAYWOOD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

To the Honorable Supreme Court of the United States, and To the Honorable Harlan F. Stone, Chief Justice:

I.

Summary and Short Statement of the Matter Involved.

This is an action in mandamus which was begun in the Circuit Court of Cook County, Illinois, by a complaint filed in the name of the People of the State of Illinois *ex rel.* Earle G. H. Cromer, as plaintiff. The petition was filed

by Cromer as an elector resident and taxpayer in the Village of Maywood, Cook County, Illinois, for a writ of mandamus to compel the defendants therein named, who were the corporate officers of the Village of Maywood, to call an election to fill an alleged vacancy in the office of Police Magistrate. This petitioner, Edward D. Markham, was by order of said Circuit Court made an additional defendant in said cause which proceeded to final judgment awarding the writ of mandamus as prayed in the complaint. Edward D. Markham, by his attorney, and all of the other defendants, by their attorney, filed motions to strike the complaint, which motions were overruled; the defendants elected to stand by the motions, and judgment was entered against them accordingly.

Edward D. Markham prosecuted an appeal to the Supreme Court of Illinois which affirmed the judgment in an opinion filed November 17, 1942, which is reported in 381 Ill. page 337.

The basis of the alleged vacancy in the office of Police Magistrate requiring the calling of an election, which was alleged in the complaint filed by Cromer, was that after petitioner had been elected to the office of Police Magistrate and qualified, and while holding said office, he "accepted an office of honor and profit under the United States viz.: Captain in the United States Army" and "that the acceptance of said office under the United States *ipso facto* constituted a resignation and disqualification to continue in said office of Police Magistrate under the Constitution of Illinois, so that said office of Police Magistrate became vacant and continues to be vacant".

The single question involved under the pleadings was and is whether or not the acceptance of a commission in time of national emergency in any branch of the United States Army (other than the Regular Army) operates automatically to create a vacancy in any office held under

the authority of the state by the civilian citizen who enters or is inducted into the armed forces of the Federal Government.

There is no allegation in the complaint and it has never been claimed that petitioner holds any commission in the Regular Army of the United States.

The *nisi prius* court held that the acceptance of a commission from the Federal Government in the armed forces operated *ipso facto* to create a vacancy in any office held under the authority of the state by any such civilian citizen.

The Supreme Court of Illinois affirmed the decision of the court below and held "that the induction into military service by one commissioned as a Captain automatically vacates the office to which a person has been previously elected."

This decision by the highest court of the State of Illinois is in direct conflict with the decisions of the highest courts of a number of other states of the United States where the same question was presented and contrary decisions rendered.

There is, therefore, a direct conflict between the decisions of the courts of last resort in several of the other states of the union, and the court of last resort in the State of Illinois, on the same identical question.

The decision of the Illinois Supreme Court is based upon the provisions of Section 3, of Article IV of the Illinois State Constitution, which is as follows:

> "nor shall any person, holding any office of honor or profit under * * * the government of the United States * * * hold any office of honor or profit under the authority of this State."

The above provision is identical with the provisions of the Constitutions of the other states which have held that this constitutional provision has no application to a situation of the character presented by this record and to the

like situations which have arisen and are arising throughout the several states of the Nation.

II.

Basis Upon Which Petitioner Contends This Court Has Jurisdiction.

The jurisdiction of this court to review by certiorari the question involved in the decision by the state court is the provision of Section 235 of the Judicial Code, being Section 343 of Title 28 U. S. C. A.; and especially paragraph b thereof which provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

III.

Question Presented.

The single question presented by this petition is:

1. Whether a civilian holding public office under the authority of a state, *ipso facto* creates a vacancy in that office if he accepts a commission in the armed forces of the United States; or

2. Whether or not under the emergency which the Congress of the United States has decided justified and produced the passage of necessary legislation to raise additional armed forces, and upon which it acted in enacting

the various Federal laws, including the Soldiers' and Sailors' Civil Relief Act and the Selective Service Act, and pursuant to which great numbers of citizens have been inducted into the United States Army, and commissions have been conferred upon individual inductees, furnishes any basis for the states to penalize the civilian citizen accepting such a commission by depriving him of the title to any elective office held by him under the authority of the state; or

3. Whether or not any of the states can deprive any such citizen of the title, right, privilege or immunity he theretofore possessed as the holder of an office under the authority of the state, and deny to him the right, privilege and immunity against such office being declared vacant for that reason; or

4. Whether or not the acceptance of a commission in time of war emergency in the armed forces created or enlarged under the authority of the Constitution and laws of the United States, by a civilian holding office under the authority of a state, amounts to the holding of an office of honor or profit under the Federal Government and thereby creates a vacancy in the state office.

IV.

Reasons Relied On for Allowance of the Writ.

1. The Constitution of the United States granting to the Congress the power to declare war, raise armies, etc. and the Selective Service Act and other supporting statutes passed pursuant to that constitutional authority, is the supreme law of the land; and it will control against any state law, either constitutional or legislative;

2. Any provision of the Constitution of Illinois to be valid must be construed as consistent and in harmony with the provisions of the supreme law of the land;

3. The decision in this case by the Supreme Court of Illinois conflicts with the decisions of the courts of last resort in a number of other states in the union which have held that the provisions of the State Constitution, common to these states, against at the same time holding offices of honor or profit under both the Federal Government and the State Government, should not and will not be construed to apply to a case where the Federal office held is that of a commission in the armed forces in time of war and not in the Regular Army of the United States.

4. The Chief Justice of the Supreme Court of Illinois has formally certified that the decision of that court in this case presents and involves a federal question. We insert herein a copy of that certificate, the original of which appears in the record filed in this cause immediately preceding page numbered 1, as follows:

IN THE SUPREME COURT OF THE STATE OF ILLINOIS.

People of the State of Illinois, *ex rel.*, Earle G. H. Cromer, *Appellee*,

vs.

The Village of Maywood, *et al.*, and Edward D. Markham, *Appellant*.

The record in this cause and the decision of the Supreme Court of Illinois, as set forth in the opinion filed herein, presents and involves a Federal question, to-wit: whether or not the Constitution of the United States and the Acts of Congress passed pursuant thereto in the raising of an army in time of war, or the provisions of Section 3 of Article IV of the Constitution of the State of Illinois, is controlling in determining the civilian status of the appellant when he received a commission as Captain in the armed forces of the United States.

The Federal question presented and involved in the complaint filed in the *nisi prius* court in this case and the opinion of the Supreme Court of Illinois filed herein, shows that the question was presented and involved as to whether or not the acceptance or holding by appellant of a commission as Captain in the armed forces of the United States operated to render vacant appellant's office of Police Magistrate in the Village of Maywood, Illinois under the provisions of Section 3 of Article IV of the Constitution of the State of Illinois which provides:

> "Nor shall any person holding any office of honor or profit under any foreign government or under the government of the United States hold any office of honor or profit under the authority of this State."

and whether or not the said provision of the Constitution of the State of Illinois is in conflict with the Constitution and Laws of the United States relating to the induction of civilians into the armed forces of the United States in the state of war existing at the time said commission was granted and accepted.

And the undersigned presiding Justice of the Supreme Court certifies accordingly.

CLYDE E. STONE,
Presiding Justice of the Supreme Court of the State of Illinois.

WHEREFORE, your petitioner prays that this court issue a writ of certiorari to the Supreme Court of the State of Illinois, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Supreme Court of the State of Illinois had in the case numbered and entitled on its docket, No. 26765, The People, *ex rel.*, Earle G. H. Cromer, Appellee, *vs.* The Village of Maywood, *et al.* (Edward D. Markham, Appellant), to the end that this cause may be reviewed and determined by this court as provided by the

statutes of the United States, and that the judgment and decree herein of the said Supreme Court of Illinois may be reversed by this court, and for such other and further relief as to this court may seem proper.

Respectfully submitted,

CHARLES J. MONAHAN,
77 West Washington Street,
Chicago, Illinois,

HENRY I. GREEN,
Urbana, Illinois,
Attorneys for Petitioner.